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RIGHT OF PRIVACY.

So much has been written already on this subject, that some explanation or apology would seem proper for adding further discussion of this question which has been treated so ably in the various Law bulletins. Our apology is a recent decision by the Supreme Court of Georgia in which this question arose directly for decision, and as will appear further on, the court expressly disapproved of the leading case on this subject decided in New York, and on a very similar state of facts made a ruling diametrically opposed to this New York case. So that we now have two opposite decisions on this question. Which will our court follow? Ordinarily, they will not hesitate long in their choice between Georgia and New York, but to our mind the true rule is announced in the Georgia case, in which all the justices concurred, while in the New York case, three of the associate judges dissented.

This is a right immensely important to public men and others that keep themselves constantly before the public, but is no less cherished by persons in the private walks of life. A right to be guarded from abuse as zealously as the right to life and liberty. Indeed, by curtailing it in the smallest degree, the so-called inalienable right of the citizen to "the pursuit of happiness" undisturbed with a few exceptions, will be impaired if not entirely destroyed.

No person can be compelled, against his consent, to exhibit his person in a public place, unless such exhibition is demanded by the law of the land, and this embraces the duties incumbent on all citizens, such as jury duty, and the inspection and physical examination of his person in open court, which often happens in personal injury cases.

The stumbling block which many have encountered in the way of a recognition of the existence of a right of privacy has been that the recognition of such right should inevitably tend to curtail the liberty of speech and of the press. The right to speak

and the right of privacy have been coexisting. Each has a natural right, each exists, and each must be recognized and enforced with due respect for the other. But the constitutional prohibition against passing a law abridging freedom of speech or of the press, was not intended to confer a license, without any limitation, to override the rights of others. The right preserved and guaranteed against invasion by the constitution is, therefore, the right to utter, or to write one's sentiments subject only to the limitation that in doing so he shall not be guilty of an abuse of this privilege by invading the legal rights of others. Thus, slander and libel is an abuse of the constitutional right of freedom of speech and liberty of the press. Likewise, statutes making blasphemy and profanity unlawful, are not unconstitutional as being in conflict with this constitutional inhibition.

In a recent well-considered case from the Supreme Court of Georgia, Pavesich *v.* New England Life Ins. Co., 122 Ga. 190, this question was so ably and thoroughly discussed, and the prior cases on the subject so exhaustively reviewed, that its importance can not be doubted for an instant. The question was squarely presented: Whether an individual has a right of privacy which he can enforce and which the courts will protect against invasion. The court said: "It is to be conceded that prior to 1890 every adjudicated case, both in this country and in England, which might be said to have involved a right of privacy, was not based upon the existence of such right, but was founded upon a supposed right of property, or a breach of trust or confidence, or the like; and that, therefore, a claim to a right of privacy, independent of a property or contractual right or some right of a similar nature, had, up to that time, never been recognized in terms in any decision. The entire absence for a long period of time, even for centuries, of a precedent for an asserted right should have the effect to cause the courts to proceed with caution before recognizing the right, for fear that they may thereby invade the province of the lawmaking power; but such absence, even for all time, is not conclusive of the question as to the existence of the right. The novelty of the complaint is no objection when an injury cognizable by law is shown to have been inflicted on the plaintiff."

A right of privacy is derived from natural law, recognized by

municipal law, and its existence can be inferred from expressions used by commentators and writers on the law as well as by judges in decided cases. Pavesich *v.* New England Life Ins Co., 122 Ga. 190.

The right of privacy is embraced within the absolute rights of personal security and personal liberty. Pavesich *v.* New England Life Ins. Co., 122 Ga. 190.

The right of privacy has its foundation in the instincts of nature. It is recognized intuitively, consciousness being the witness that can be called to establish its existence. Any person whose intellect is in a normal condition recognizes at once that as to each individual member of society there are matters private and there are matters public so far as the individual is concerned. Each individual as instinctively resents any encroachment by the public upon his rights which are of a private nature as he does the withdrawal of those of his rights which are of a public nature. A right of privacy in matters purely private is therefore derived from natural law. This idea is embraced in the Roman's conception of justice, which "was not simply the external legality of acts, but the accord of external acts with the precepts of the law prompted by internal impulse and free volition." McKeldey's Roman Law (Dropsie), § 123. Pavesich *v.* New England Life Ins. Co., 122 Ga. 190.

Waiver of Right.—The right of privacy, however, like every other right that rests in the individual, may be waived by him, or by any one authorized by him, or by any one whom the law empowers to act in his behalf, provided the effect of his waiver will not be such as to bring before the public those matters of a purely private nature which express law or public policy demands shall be kept private. This waiver may be either express or implied, but the existence of the waiver carries with it the right to an invasion of privacy only to such an extent as may be legitimately necessary and proper in dealing with the matter which has brought about the waiver. It may be waived for one purpose and still asserted for another; it may be waived in behalf of one class and retained as against another class; it may be waived as to one individual and retained as against all other persons. The most striking illustration of a waiver is where one either seeks or allows himself to be presented as a candidate for public office. He

thereby waives any right to restrain or impede the public in any proper investigation into the conduct of his private life which may throw light upon his qualifications for the office or the advisability of imposing upon him the public trust which the office carries. But even in this case the waiver does not extend into those matters and transactions of private life which are wholly foreign and can throw no light whatever upon the question as to his competency for the office or the propriety of bestowing it upon him. One who holds public office makes a waiver of a similar character; that is, that his life may be subjected at all times to the closest scrutiny in order to determine whether the rights of the public are safe in his hands; but beyond this the waiver does not extend. So it is in reference to those belonging to the learned professions, who by their calling place themselves before the public and thereby consent that their private lives may be scrutinized for the purpose of determining whether it is to the interest of those whose patronage they seek to place their interests in their hands. In short, any person who engages in any pursuit or occupation or calling which calls for the approval or patronage of the public submits his private life to examination by those to whom he addresses his call, to any extent that may be necessary to determine whether it is wise and proper and expedient to accord to him the approval or patronage which he seeks. Pavesich *v.* New England Life Ins. Co., 122 Ga. 190.

Determination of Right of Privacy.—It may be said that to establish a liberty of privacy would involve in numerous cases the perplexing question to determine where this liberty ended and the rights of others and of the public began. This affords no reason for not recognizing the liberty of privacy and giving to the person aggrieved legal redress against the wrongdoer in a case where it is clearly shown that a legal wrong has been done. It may be that there will arise many cases which lie near the border line which marks the right of privacy on the one hand and the right of another individual or of the public on the other. But this is true in regard to numerous other rights which the law recognizes as resting in the individual. In regard to cases that may arise under the right of privacy, as in cases that arise under other rights where the line of demarkation is to be determined, the safeguard of the individual on the one hand and of the public

on the other is the wisdom and integrity of the judiciary. Each person has a liberty of privacy, and every other person has as against him liberty in reference to other matters, and the line where those liberties impinge upon each other may in a given case be hard to define; but that such a case may arise can afford no more reason for denying to one his liberty of privacy than it would to deny to another his liberty, whatever it may be. Pavesich *v.* New England Life Ins. Co., 122 Ga. 190.

Advertisement by Pictures.—The publication of a picture of a person, without his consent, as a part of an advertisement, for the purpose of exploiting the publisher's business, is a violation of the right of privacy of the person whose picture is reproduced, and entitles him to recover without proof of special damage. The publication of one's picture, without his consent, for such a purpose is in no sense an exercise of the liberty of speech or of the press, within the meaning of those terms as used in the constitution. Pavesich *v.* New England Life Ins. Co., 122 Ga. 190, 50 S. E. 68, 106 Am. St. Rep. 104, disapproving Roberson *v.* Rochester Folding Box Co., 171 N. Y. 546.

In this Georgia case the court said that Roberson *v.* Rochester Folding Box Co. (1901), 171 N. Y. 540, was the first and only decision by a court of last resort involving directly the existence of a right of privacy. The New York court decided that the publication of person's picture for advertising purposes would not be enjoined on the ground that it was an invasion of the right of privacy. The decision was by a divided court. Chief Judge Parker and three of the associate judges concurred in denying the injunction, while Judge Gray, with whom concurred two of the associate judges, filed a dissenting opinion, in which it was maintained that the injunction should have been granted. The Georgia court criticised and disapproved the conclusion and reasoning of the majority in this New York case, and adopted and followed the reasoning of Judge Gray in his dissenting opinion.

Survivability of Action.—It has been decided that the right of privacy is a personal right and dies with the person. Schuyler *v.* Curtis, 147 N. Y. 436; Atkinson *v.* Doherty, 121 Mich. 372, 80 N. W. 285, 80 Am. St. Rep. 507.

But in Pavesich *v.* New England Life Ins. Co., 122 Ga. 190, the court said: "While the right of privacy is personal, and

may die with the person, we do not desire to be understood as assenting to the proposition that the relatives of the deceased can not, in a proper case, protect the memory of their kinsman, not only from defamation, but also from an invasion into the affairs of his private life after his death. This question is not now involved, but we do not wish anything said to be understood as committing us in any way to the doctrine that against the consent of relatives the private affairs of a deceased person may be published and his picture or statue exhibited."

Distinction between Public and Private Character.—The decision of Judge Colt, in Corliss *v.* E. W. Walker Co., in the United States Circuit Court, District of Massachusetts (64 Fed. 280), contains a discussion of the distinction between public and private characters as bearing upon the right of privacy. The suit was brought by the widow and children of the late George H. Corliss to enjoin the publication of his biography, and also from printing and selling his picture in connection therewith. On the former hearing (57 Fed. 434), the injunction against the publication of the biography was refused on the grounds of the constitutional privilege of freedom of speech and publication, and that the subject matter of equity jurisdiction is confined to "civil property and injury to property, whether actual or prospective." The question whether or not Mr. Corliss had been a public character was declared immaterial on this point. An injunction against printing and circulating the picture was, however, granted on the ground that the portrait or photograph from which it was taken had been obtained under conditions which made its use for publication a breach of faith. Upon the second hearing, however, this element of bad faith was eliminated from the case, and the court has now dissolved the injunction as to the picture on the ground that, as Mr. Corliss was a public character, the right to print and circulate his picture could not be gainsaid. The opinion contains this language: "But, while the right of a private individual to prohibit the reproduction of his picture or photograph should be recognized and enforced, this right may be surrendered or dedicated to the public by the act of the individual, just the same as a private manuscript, book or painting becomes (when not protected by copyright) public property by the act of publication. The distinction in the case of a picture or photo-

graph lies, it seems to me, between public and private characters. A private individual should be protected against the publication of any portraiture of himself; but where an individual becomes a public character, the case is different. A stateman, author, artist or inventor who asks for and desires public recognition, may be said to have surrendered this right to the public. When any one obtains a picture or photograph of such a person, and there is no breach of contract or violation of confidence in the method by which it was obtained, he has the right to reproduce it, whether in a newspaper, magazine or book. It would be extending this right of protection too far to say that the general public can be prohibited from knowing the personal appearance of great public characters. Such characters may be said, of their own volition, to have dedicated to the public the right of any fair portraiture of themselves. In this sense, I can not but regard Mr. Corliss as a public man. He was among the first American inventors, and he sought public recognition as such." It was alleged that Mr. Corliss during his lifetime had consented to the distribution of large numbers of his pictures, and if the court had based its action expressly upon the ground of dedication or consent, as appearing in this particular case, the decision would not bear seriously upon the general right of privacy. But the broad reasoning above quoted would seem to authorize the printing of a picture of any person who, in any capacity, has appeared before, or made an impression upon, or rendered a service to the public. We do not see where the line can be drawn, and why any person should not be considered a "public" character whose life or achievements have been such that the public would be interested in hearing about him and becoming familiar with his physiognomy. Again, it seems a vicious doctrine to deny all right of privacy even to concededly public men. The right of the public should be recognized only in the public side or public relation of a public man, not in his whole personality. As said by Presiding Justice VanBrunt in Schuyler *v.* Curtis (64 Hun 594): "It is undoubtedly true that by occupying a public position, or by making an appeal to the public, a person surrenders such part of his personality or privacy as pertains to and effects the position he fills or seeks to occupy; but no further." The law of privacy ought to permit a statesman, or inventor, or artist,

or philanthropist, no matter how famous he becomes, to enjoin the publication of his picture or the erection of a statue, if such form of publicity is distasteful to him. The New York case just referred to will probably be generally recalled. It was brought by one of the family, in behalf of himself and all the nearest relations of a deceased lady, who had become well known in her lifetime through works of philanthropy, to enjoin the preparation of a statue of her for exhibition at the Columbian Exhibition at Chicago in 1893. A preliminary injunction was granted (27 Abb. N. C. 387), on the ground that Mrs. Schuyler had been merely a private citizen, and that her relatives could, therefore, forbid a public exhibition of a bust of her after her decease. Upon appeal at the general term, Judge VanBrunt, writing the opinion above referred to, sustained the injunction on general grounds, expressly disapproving, however, of a distinction in the right of privacy as between public and private persons. Thereafter, the action was tried and the injunction made permanent (30 Abb. N. C. 376), and the judgment then granted was subsequently affirmed at the general term. In Manola *v.* Stevens, the New York Supreme Court at special term granted an injunction under circumstances described as follows in the opinion in Schuyler *v.* Curtis, at special term (27 Abb. N. C. 401): "The plaintiff alleged that while playing in the Broadway Theatre, in a role which required her appearance in tights, she was, by means of a flash light, photographed surreptitiously and without her consent from one of the boxes of the theatre. It is true there was no opposition to the preliminary injunction being made permanent; but this court issued one to restrain any use being made of the pictures so taken." An actress would seem to be a public character, and moreover, the picture in question was taken of her while actually officiating in her public capacity. That case is accordingly a precedent for restraining at the suit of a living person the circulation of her pictures even though she be a public character. The question has, however, always seemed difficult with regard to deceased persons, and the general nature and limitations of such right are not rendered clear by the various opinions delivered in Schuyler *v.* Curtis. Neither in that case nor in the Corliss case above referred to, was the bill filed by executors and administrators; and we do not think it could be

seriously maintained that a right of property in the ordinary sense, which would pass to legal representatives, existed. These actions were both brought by relatives as such, and the injunction in Schuyler *v.* Curtis was sustained on the broad ground of enjoining a wrongful act. In Schuyler *v.* Curtis it appeared that the surviving relatives of the deceased were unanimous in the desire to restrain the erection of the proposed statue, and therefore, in sustaining the action of one of such relatives, in behalf of one of them, the court was not obliged to look carefully into or formulate definite rules as to the right to sue. If a similar case should arise, in which the relatives disagreed among themselves, especially if they were of equal degree, the remedy, if granted at all, would necessarily rest in the exercise of judicial discretion.